IN THE SUPREME COURT OF TENNESSEE

MARION M. PICKLE, JR.
vs.
STATE OF TENNESSEE
} KNOX COUNTY CRIMINAL

Opinion

Filed January 8, 1964. W. H. Eagle, Clerk.

Marion M. Pickle, Jr., hereinafter referred to as defendant, appeals from a conviction of assault and battery, wherein the jury assessed a fine of Fifty One ($51.00) Dollars and the Trial Judge assessed a sentence of ninety (90) days in the workhouse.

The assignments of error are to the effect as follows:

(1) Defendant's plea in abatement to the indictment on the grounds that the grand jury was not selected in accordance with Chapter 173, Private Acts of 1911, as amended, which provides for a board of jury commissioners, etc., for Knox County should have been sustained.

(2) Defendant's motion in arrest of judgment based upon two irregularities (1) the Trial Judge should have recused himself on the question of whether or not the grand jury was selected in accordance with the law because he (Trial Judge) was the one who committed the error, and (2) the Trial Judge in his instruction to the jury did not tell the jury that he, under the law, had authority to impose a Workhouse sentence up to eleven months and twenty-nine days, in addition to the fine imposed by the jury, in the event the jury found the defendant guilty of the offense charged in the indictment.

(3) The evidence preponderates against the verdict and in favor of the innocence of the accused.

Defendant filed a plea in abatement, supported by affidavit to the effect the grand jury rendering the indictment under which he was convicted was not chosen according to law, same being Chapter 173, Private Acts of 1911, as amended. The order of the Trial Judge overruling this plea recites the Court heard the evidence offered by the defendant, but does not recite the evidence; and further defendant was given 90 days to prepare and file a bill of exceptions containing this evidence, which has not been done. Since we cannot tell whether the record before us contains all the evidence heard by the Trial Judge on this plea, as the record does not affirmatively show it to be all the evidence, then such cannot be reviewed here on appeal. Eatherly v. State, 118 Tenn. 371; Hall v. Hall, 193 Tenn. 74. The first assignment of error is overruled.

Defendant alleges the Trial Judge should have recused himself on the question of whether or not the grand jury was selected in accordance with the law since, if there were a mistake it was made by the Trial Judge himself. There is no merit in this assignment.

Defendant alleges as error the failure of the Trial Judge to instruct the jury, that, under the law, he had authority to impose a work house sentence in addition to any fine they might assess. On this matter the Trial Judge instructed the jury as follows:

> "In the event that you find the defendant guilty beyond a reasonable doubt and feel that the punishment should be by fine of more than $50.00, it will be your duty to fix that fine in any amount between $50.00 and $1,000.00. The law provides for a fine for a violation of this law up to $1,000.00. The constitution specifically restricts the Court from levying any

fine of more than $50.00 unless it is a fixed fine and so the Court can only fine the defendant in event of conviction up to $50.00. If you find the defendant guilty and feel that his fine should be $50.00 or less, you may report to the Court that you find the defendant guilty as charged and leave the punishment to the Court, in which event the fine can be up to $50.00. If you desire or think under the facts and circumstances of this case and the law that the fine in event of conviction should be more than $50.00, then you must fix it;"

On this question counsel for defendant in their brief state:

> "In the instant case, we respectfully insist that it was the duty of the learned trial judge to state to the jury exactly the measure of punishment which could be meted out to the defendant, both by the jury and the Court in view of the fact that the jury was not only asked to find the defendant guilty or not guilty but if guilty to fix his fine. By no other means can the jury intelligently pass upon a fine. We feel that it was extremely important that that jury know that, in additional to any fine that it might feel was justified, the trial judge could heap additional punishment on the shoulders of this defendant."

There were no special requests, nor does this record indicate the defendant invoked Section 40-2704, T.C.A.

We have not been cited, nor have we been able to find, any authority requiring a trial judge in the trial of a misdemeanor to instruct the jury that, in addition to any fine they might levy, it was also within his authority to assess a jail term of any time less than one year. In this case the assessing, or not assessing, a jail term was a matter directed solely to the Trial Judge and it was not necessary he so charge the jury. If the Trial Judge had so instructed them of his authority in this matter of a jail term, they would still have to make their judgment upon the

amount of fine, without knowing what the Trial Judge was going to do about the jail term; then what advantage would the information be to them. The second assignment of error is overruled.

We have examined the record and do not find the evidence preponderates against the verdict. Defendant strongly insists certain witnesses should be believed rather than other witnesses. The credibility of the witnesses is exclusively left to the jury as shown by a number of decisions of this Court. The third assignment of error is overruled.

Judgment affirmed.

/s/ Ross W. Dyer
Ross W. Dyer, J.

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM, 1963

WEDNESDAY JANUARY 8th, 1964

(Filed January 8, 1964, W. H. Eagle, Clerk.)

BE IT REMEMBERED, That at a September Term of the Supreme Court for the Eastern Division of Tennessee, held at Knoxville on the Second Monday of September, 1963, the following proceedings were had and entered of record, to-wit:

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Came the plaintiff in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration

thereof the Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered and adjudged by the Court that the State of Tennessee recover of Marion M. Pickle, Jr., the plaintiff in error, for the use of the County of Knox, the sum of $51.00, the fine assessed against him in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the costs of the appeal.

It is further ordered by the Court that the plaintiff in error be confined in the county jail or workhouse of Knox County, subject to the lawful rules and regulations thereof, for a term of Ninety (90) days and that after the expiration of the aforesaid term of imprisonment he remain in the custody of the Sheriff of Knox County, until the said fine and costs are paid, secured or worked out in the manner required by law and this cause is remanded to the Criminal Court of Knox County for the execution of this judgment.

/s/ Hamilton S. Burnett

MARION M. PICKLE, JR.
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} KNOX CRIMINAL

Opinion on Petition to Rehear

(Filed April 8, 1964. W. H. Eagle, Clerk.)

A petition to rehear has been filed in this case, which is grounded on the alleged failure of this Court to consider the petitioner's motion suggesting dimunition of record, which motion was filed in this Court prior to the oral

argument of this case. The petitioner asserts that a rehearing on the "complete" record should be granted in order that the method used in selecting the jury list for the March, 1963, term of the court below may be considered by this Court in view of the reasoning of the Court of Appeals in the case of York v. Roos (opinion by Taylor, S.J., filed September 3, 1963). The petit jury which convicted the petitioner came from a jury list for the March term.

By his motion, the petitioner sought to bring before this Court the procedure used in selecting the jury list for the March term of the court below. He asserted that the minute entries of the court below show the manner in which this list was compiled, and that these entries show that the individuals on the list were selected in a manner contrary to the provisions of Chapter 173, Private Acts of 1911, the jury selection law applicable to Knox County at the time this list was prepared. In support of his assertion, the petitioner attached to his motion a number of exhibits, one of which purported to be the minute entries of the court below for November 5, 1962, and March 4, 1963. These entries include the jury lists presented to the court below in the December and March terms and also show the individuals subsequently selected from these lists for grand and petit jury duty.

In our opinion, these minute entries wholly fail to show the manner in which the individuals on these jury lists were selected. It follows from this that the entries could not show that the jury list was compiled in a manner contrary to Chapter 173 Private Acts of 1911. While it is true that these minute entries show that the Chairman of the Jury Commission presented jury lists to the court below they wholly fail to show how the names on the list were selected and who selected them. In fact, these entries fail

to show anything about the manner in which the names were selected. In York v. Roos, the actual procedure used in selecting jury lists was before the Court of Appeals, but this is not the case here.

The petitioner is wrong in his assumption that this Court failed to consider his motion. The motion was considered and overruled because nothing could be gained by bringing up the minute entries in question. The suggestion of diminution, under the circumstances would have accomplished nothing. Standard Life Ins. Co. of the South v. Adams, 174 Tenn., 405, 126 S.W.2d, 311.

From what has been said above it results that the petition to rehear must be overruled and is hereby denied.

Per Curiam.

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

SEPTEMBER TERM 1963

MARION M. PICKLE, JR.
vs.
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} KNOX COUNTY CRIMINAL

Petition to Rehear Denied

(Filed April 30, 1964. W. H. Eagle, Clerk.)

This cause came on to be further heard on the Petition to Rehear and Reply thereto, upon consideration whereof the Court is of opinion the petition to rehear is not well taken and should be denied.

It is therefore ordered and decreed by the Court that the petition to rehear is denied.

Costs on the petition to rehear will be paid by Marion M. Pickle, Jr., for which let execution issue.

/s/ Hamilton S. Burnett
/s/ S. L. Felts
/s/ Ross W. Dyer

RULES OF THE SUPREME COURT OF THE STATE OF TENNESSEE

Rule 9

"*Suggestions of Diminution of Record.*—The motion shall be reduced to writing, and verified by the signature of counsel, and shall state specifically the portion of the record omitted from the transcript, and that notice of the motion has been given to opposite counsel, and made before the case is called for trial, so that the record may be perfected for the hearing, or the imperfection will be waived. When the motion is allowed an entry on the minutes shall be made to that effect. The court will, however, in its discretion, consider any record supplied after hearing and before disposition of the case."